

Quarterly Report
of the
ATTORNEY GENERAL
of
ALABAMA



For The Period
From January 1, 1957
Through March 31, 1957

VOLUME 86

JOHN PATTERSON, Attorney General



QUARTERLY REPORT
of the
ATTORNEY GENERAL
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ALABAMA
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Volume No. 86

**TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS
OF ALABAMA:**

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from January 1, 1957, through March 31, 1957, is published in compliance with the provisions of Title 55, Section 228, Code of Alabama, 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

JOHN PATTERSON,
Attorney General.

JOHN PATTERSON
Attorney General

JOSEPH G. ROBERTSON
Confidential Assistant

Assistant Attorneys General

MacDonald Gallion
Senior Assistant

James Noel Baker
Robert P. Bradley
Owen Bridges
Paul T. Gish, Jr.
Robert G. Kilgore, Jr.
Gordon Madison
William N. McQueen
George Mentz
Edmon L. Rinehart
James L. Screws
Bernard F. Sykes
James W. Webb
George Young

Assistant Attorney General Assigned to the Department of
Agriculture and Industries:

George O. Miller, Jr.

Assistant Attorneys General Assigned to the Department of
Conservation:

A. J. Harris
William T. Edwards, Jr.
William G. O'Rear

Assistant Attorney General Assigned to the Department of
Examiners and Public Accounts:

James T. Hardin

Assistant Attorney General Assigned to the Department of
Finance:

Randolph G. Lurie

Assistant Attorney General Assigned to the Department of
Welfare:

Alvin G. Prestwood

Assistant Attorneys General Assigned to the Department of
Revenue:

Willard W. Livingston
H. Grady Tiller
William H. Burton, Jr.
James R. Payne
Arthur Joe Grant
B. Frank Loeb

OPINIONS

January 14, 1957

Hon. W. A. Gayle
Mayor
City of Montgomery
Montgomery, Alabama

Municipalities—Insurance.

A municipal corporation may legally pay premiums on liability insurance which covers liability, if any, of a city for injuries or damages resulting from the negligent operation of its motor vehicles in performing its corporate or ministerial functions and also its governmental functions; extends coverage to the agents or employees of the city operating same; provides for payment by insurance company of all costs and expenses of defending suits against city, whether groundless or not; provides for suits against insurance company by injured parties in certain instances; provides for payment of premiums on appeal bonds and bonds to release attachments; and provides that insurance company will pay expenses incurred by insured for necessary immediate medical and surgical relief at time of accident.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of January 3, 1957, is as follows:

"The City of Montgomery desires to obtain public liability insurance on all motor vehicles owned by the City of Montgomery which are operated by city officials, and by agents, servants or employees of the City. The protection sought by the desired insurance is against personal injuries and property damages inflicted during the course of the operation of these motor vehicles.

"We seek the opinion of your office on the liability for the expenditure of public funds of the City of Montgomery for premiums on such public liability insurance. More specifically, we desire to know whether payment of premiums on such policies will be proper expenditures for such coverage on vehicles operated in the course of so-called governmental functions, as well as in the course of so-called corporate or proprietary functions. It is the hope of the City of Montgomery that such public liability insurance may be obtained on all vehicles owned and operated by the City.

"This matter is a very pressing one and an early determination will be appreciated."

Liability insurance is that form of insurance by which the insured is indemnified against loss or liability on account of bodily injuries or property damage sustained by others.

There is a difference between a contract of insurance against loss and one against liability. In case of insurance against liability, the obligation of insurer becomes fixed when liability attaches to the insured, whereas, in case of insurance against loss or damage, the insurer does not become liable until loss has been suffered. That means when the damages have been paid by insured. *Continental Auto Insurance Underwriters v. Menuskin*, 222 Ala. 370, 132 So. 883.

The most common form of liability insurance insures against liability but does not require insurer to pay until a judgment has been obtained by the injured party against the insured, or the amount of damages otherwise fixed by agreement between those having authority to so agree under the terms of the policy of insurance.

Under some policies which insure directly against liability, insurer's liability accrues immediately on occurrence of the injury or event on which liability depends, and does not depend on the recovery or satisfaction of a judgment by the injured person against the insured. *Indemnity Company of America v. Bollas*, 223 Ala. 239, 135 So. 174; Title 28, Section 11, Code of Alabama 1940; Title 28, Section 12, Code of Alabama 1940, as amended by Act No. 283, General and Local Acts 1953, page 350.

Under still other liability policies, which are considered as being for the benefit also of third parties, action may be had directly against the insurance company without first suing the insured.

Under most modern-day liability policies, the insurer contracts to pay the cost and expenses of defending claims or suits against the insured, whether such claims or suits are groundless or not. Many liability policies also provide for the payment of medical or surgical services to those accidentally injured by the operation or use of a motor vehicle, and the insurer's liability in such cases does not depend upon there being liability on the part of the insured.

In cases where the policy covers only the liability of insured, it is the liability of insured which determines the liability of the insurance company and the company is liable only when insured is liable. However, most present-day liability policies contain an omnibus clause or extended coverage which covers agents, servants or employees of insured and others using the motor vehicle with the named insured's permission. These clauses extend

protection to the operator and he is, in a sense, a substitute for the owner while it is being operated with the latter's permission.

It can be seen, from what has been said above, that liability policies of insurance may contain many different contractual provisions giving rights and affording protection to one or many different persons. In order to intelligently consider whether or not a city may legally pay premiums on a liability insurance policy, the nature and extent of the coverage of the contract should be stated as different results might be reached as to one type of policy and an entirely different result reached as to others. In many cases this has not been done in the past by those making requests for opinions from this office, and a number of our opinions seem to have assumed that the policies of liability insurance contain provisions against loss or damage to the name insured only.

If a liability policy insures only a loss or liability which by law can never occur to insured, the expenditure of public money for the premium on such a policy would not be authorized for nothing could be received in return for payment of the premium. *People v. Standard Accident Insurance Company*, 108 Pac. 2d 923; *Jerauld County v. St. Paul Mercury-Indemnity Company*, 71 N. W. 2d 571.

Contracts of liability insurance, which, however, provide for extended coverage and contain omnibus clauses as described above and also provide for the defense of suits at the insurance company's expense, whether groundless or not, and provide for suits by the injured persons against the insurance company under certain conditions, are deserving of different consideration. Such also may be true when the policies also provide for payment of medical and surgical expenses.

In *Nohl v. Board of Education of the City of Albuquerque*, 199 Pac. 373, 16 A.L.R. 1085, the school board had statutory authority to defray all expenses connected with the proper conduct of the public schools in their respective districts. Under such authority, it was held that group insurance could legally be procured for school teachers and employees, it being shown that such was conducive to the proper conduct of the school by enabling the county board of education to procure and retain a better class of teachers.

To like effect is *State, Ex Rel. Thompson v. City of Memphis*, 251 S.W. 46, where the court said: "Ordinarily what can be done indirectly can be done directly. If a city can increase the wages of its employees, why not invest the increase in insurance for them instead of paying it to them direct, if, by so doing, they are better satisfied and the city obtains better service." See also *Bowers v. City of Albuquerque*, 200 Pac. 421, and *Opinion of the Justices*, 249 Ala. 88, 30 So. 2d 14.

This office is informed by the attorneys for the City of Montgomery, who discussed the city's problem with this office, that it is difficult to ob-

tain efficient and satisfactory drivers of its motor vehicles without affording protection to them from the claims and suits of third parties arising out of the operation and use of the motor vehicles owned by the city. They are better satisfied employees with such protection.

The Attorney General is the attorney for state agencies and as such represents them, but this is not true as to cities for they have to employ their own counsel and in many instances expend considerable sums of money in the defense of suits arising out of motor vehicle operations, whether such suits are groundless or not. It costs the city money in many instances to establish in court its governmental immunity from liability for the negligence of its employees or agents. In other cases, questions of fact are presented which have to be litigated to decide whether or not the case is one to which is applicable the doctrine of governmental immunity.

There are statements in the case of *Ayers v. Hartford Accident and Indemnity Company*, 106 Fed. 2d 958 (5th C.C.A.), which pertain to the questions here considered. In that case, the policy of liability insurance was issued to the Hart County Board of Education, and in speaking of certain provisions of the policy, the court through Judge Sibley said:

"And lastly it is contended that to construe the policy literally as we have done is to make it unreasonable and virtual fraud. It is said that this Company before the policy was written had established in Alabama that school authorities are under no legal liability for school bus accidents and that a policy like this would impose none on the company for such injuries. *Hughes v. Hartford Accident & Indemnity Co.*, 223 Ala. 59, 134 So. 461. So the premium on this policy of over a thousand dollars of the public money has thus been paid for nothing. To right this wrong complainant urges that the policy be so construed as really to insure. She alleges that some small claims have been paid under it, and that in point of fact the School Board and the Company intended by it to insure the school children and the public against injury by the bus. The argument is appealing, but we cannot yield to it. The fraud, if any, is on the Board who paid the money for the policy. Mrs. Ayers did not take out the policy. If through fraud or mistake it does not express the true contract between the Board and the Company, in a proper proceeding and with proper parties it might be reformed. *Jacobs v. Merchants Fire Assur. Corp.*, 5 Cir., 99 F. 2d 655. Without such reformation we are bound to take it as saying exactly what the parties to it intended it to say. And the Board indeed appears to have had some benefit from it. The petition alleges, without any details, that a few claims have been paid, the Company thus seeming to acknowledge that the policy covered those claims. And an important provision of it is the company's promise to defend any suits against the Board for injury, death, or property damage; to pay all costs taxed; and to pay for medical or surgical aid at the time of the accident; all independently of the Board's actual liability. The Company did, we

suppose, so defend Mrs. Ayers' suit against the Board, the first of its kind in Georgia. The policy also gives the right without further premium to extend the insurance to the bus driver as an assured. If this has been done, judgment might have been recovered against him and collected out of the Company. The premium thus purchased important rights, and did not go wholly for nothing."

Then, there is the case of *Hughes v. Hartford Accident and Indemnity Company*, 223 Ala. 59, 134 So. 461, where it was held that the County Board of Education of Calhoun County had the implied authority to insure its bus transportation for the benefit of the occupants even though the board itself would not be legally liable for the injuries caused by the negligence of its bus driver. This lack of liability on the part of the school board is based upon the principle of immunity from liability because in operating the school bus the board was performing a governmental function. The court pointed out that contracts not contrary to law and the public policy of the state may ordinarily be made for the benefit of third parties directly interested. It then went on to hold that the county board had implied authority to make the contract of insurance there under consideration.

The City of Montgomery has submitted to this office a sample copy of the liability policy which it desires to procure. An examination of this policy shows that it protects the city from liability for injuries and property damage caused by the negligent performance of its corporate or ministerial duties and also such, if any, as to its public or governmental functions.

The policy further affords protection to those operating the motor vehicle under an omnibus or extended coverage clause contained in the policy. No suit against the company is permitted by an injured party, however, until the amount of the insured's obligation to pay shall have been finally determined, either by judgment against the insured or by written agreement of the insured, the claimant and the company.

The policy also provides that the company will defend all suits against the insured at its expense; will pay premiums on bonds to release attachments and on appeal bonds; will pay expenses incurred by insured for such immediate medical and surgical relief to others shall be imperative at the time of the accident.

The proposed policy will also contain an endorsement as follows:

"Immunity Endorsement

"Subject to the consent and approval of the insured, the defense of immunity from tort liability shall not be raised to any claim covered by this policy, provided:

- "1. the claimant shall file with the insured and the Company a release in writing of any right to enforce payment of such claim against insured, which release shall also contain the agreement of the claimant to enforce payment of such claim only against the Company, subject to the limits of liability named in the policy, and against anyone else who may be liable therefor, and
- "2. that the execution, acceptance or demand for such release and agreement shall not be construed as an admission of liability on the part of the Company, nor be offered in evidence for that purpose, and
- "3. that no attempt shall be made at the trial of the case to suggest the existence of insurance which covers in whole or in part any judgment which the claimant may obtain."

It is extremely doubtful that the City of Montgomery can waive governmental immunity from torts or legally contract not to plead such defense when sued. See *Kennedy v. City of Daytona Beach*, 182 So. 228 (Fla.); *Evans v. Berry*, 186 N.E. 203 (N.Y.), 89 A.L.R. 387, and note page 394.

It is stated, however, in *Rome v. London & Lancashire Indemnity Co. of America*, 169 So. 132 (La.), that:

"It is too plain for extended argument that the defense of immunity from liability because of the engagement in the operation of a governmental function is one which is purely personal to the public corporation. The exemption is based on reasons of public policy, and, where the public body deems it wise to nevertheless protect the people by insuring its activities against negligence in the operation there, it is manifest that to allow the paid insurance carrier to escape liability on such ground would be to accomplish a miscarriage of justice."

The city clerk has asked this office orally to make suggestions, if any, as to the immunity endorsement. It is suggested for consideration that the city familiarize itself with the case of *Hughes v. Hartford Accident & Indemnity Co.*, supra, and to have incorporated in the endorsement a provision reciting that the contract of insurance is made for the benefit of injured parties also, and if the insurance company in conducting the defense of the case breaches the endorsement by pleading the city's governmental immunity from liability, that in such event the injured parties shall have a direct action against the insurance company. In such event, I do not believe that the insurance company, in a suit against it, could plead the governmental immunity of the city, a defense which is personal to it. *Rome v. London and Lancashire Indemnity Company of America*, supra.

This office has heretofore ruled that a municipal corporation is liable for injuries resulting from the negligent operation of motor vehicles of the

street and electric light and water departments, and municipal funds may be legally expended to pay premiums on liability insurance on motor vehicles operated by said departments. With this previous holding, I concur. This office also ruled, however, in the same opinion, which is reported in Quarterly Report of Attorney General, Vol. 58, page 87, that a municipal corporation may not legally expend municipal funds to pay premiums on liability insurance on motor vehicles of the city while engaged in the performance of the city's governmental functions by its police and fire departments.

I do not know what contractual provisions were contained in the policy or proposed policy considered in Vol. 58, supra, but the proposed policy contract here under consideration is, in my opinion, one which the city may legally make and may legally expend its municipal funds to pay the premiums thereon.

Yours very truly,

JOHN PATTERSON
Attorney General

January 14, 1957

Hon. W. L. Horn
Commissioner
Department of Revenue

C A P I T O L

Taxation—Income Tax—Sales Tax.

The sales tax imposed by the State should be allowed the taxpayer as a deduction in computing his net income subject to State income tax.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of January 9, 1957, is as follows:

"The lawyers of this Department are unanimuos in their opinion that State sales tax imposed by Title 51, Section 753, as amended, Code of Alabama 1940 and paid by the consumer should be allowed as a deduction in computing net income upon which State income tax is due.

"This is in contradiction to regulations promulgated by the Department of Revenue in 1936 and now shown by Official Regulation No. 385.6, page 57 of State of Alabama Income Tax Laws and Regulations of 1952. "I will appreciate your rendering me an official opinion as to whether State sales tax should or should not be allowed the taxpayer as a deduction in computing his net income subject to State income tax."

Before proceeding to a specific answer to your question, I deem it advisable to consider certain statutory provisions pertinent to your inquiry.

Title 51, Section 385, Code of Alabama 1940, as last amended by Act No. 318, General Acts 1945, page 515, reads, in pertinent part, as follows:

"§ 385. Deductions (individuals).—In computing net income there shall be allowed as deductions: . . . (c) Taxes paid or accrued within the taxable year imposed: (1) By authority of the United States; (2) by the authority of any of the possessions of the United States; (3) by the authority of any states or territory, except income tax, including the State of Alabama, or of any county, school district, municipality or other taxing subdivision of the State of Alabama, except the income tax herein levied;"

It is to be specifically noted that, in computing the net income of an individual, deductions shall be allowed for all taxes paid or accrued within the taxable year when such taxes are imposed by the State of Alabama.

Title 51, Section 753, Code of Alabama 1940, as last amended by Act No. 121, General and Local Acts 1951, page 348, reads, in pertinent part, as follows:

"§ 753. Tax levied on gross receipts.—There is hereby levied, in addition to all other taxes of every kind now imposed by law, and shall be collected as herein provided, a privilege or license tax against the person on account of the business activities and in the amount to be determined by the application of rates against gross sales, or gross receipts, as the case may be, as follows:"

It would appear from a mere reading of Section 753, as amended, *supra*, that the tax thereby imposed is imposed as a privilege or license tax against persons on account of business activities, and the amount of tax is determined by gross sales or gross receipts of such persons.

It must, therefore, be determined whether tax imposed by Section 753, as amended, *supra*, is a tax on the retail merchant, or whether it is a direct tax on the ultimate consumer of the merchandise or other things subject to the sales tax.

Title 51, Section 776, Code of Alabama 1940, as last amended by Act

No. 525, General and Local Acts 1951, page 914, reads, in pertinent part, as follows:

"§ 776. Tax bracketed to be added to purchase price; refund unlawful; penalty.—Every person, firm, corporation, association, or co-partnership engaged in or continuing within this state in the business for which a license or privilege tax is required by this article shall add to the sales price and collect from the purchaser on all sales upon the gross receipts or gross proceeds of which there is levied by this article a sales tax at the rate of three (3) percent, three cents tax for each whole dollar of sales price. Provided, however, on that part of the sales price which is a fractional part of a dollar, in addition to whole dollars, and on sales of less than a dollar there shall be collected in addition to the tax collected on whole dollars, no tax on one cent to and including ten cents of sales price; one cent tax on eleven cents to and including forty cents of sales price, two cents tax on forty-one cents to and including seventy-five cents of sales price; three cents tax on seventy-six cents to and including ninety-nine cents of sales price. Provided further, that upon all sales the gross receipts or gross proceeds of which are taxed by this article at the rate of one percent, there shall be added to the sales price and collected from the purchaser by such person, firm, corporation, association, or co-partnership described in this section an amount equal to one percent of such sales price. It shall be unlawful for any person, firm, corporation, association, or co-partnership described in this section to fail or refuse to add to the sales price and collect from the purchaser the amount required by this section to be added to the sales price and collected from the purchaser; and it shall likewise be unlawful to refund or offer to refund all or any part of the amount collected, or to absorb or advertise directly or indirectly the absorption or refund of the amount required to be added to the sales price and collected from the purchaser, or any portion of such amount. Any person, firm, corporation, association, or co-partnership violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined in a sum of not less than fifty dollars nor more than one hundred dollars, or may be imprisoned in the county jail for not more than six months or by both such fine and imprisonment and each act in violation of the provisions of this article shall constitute a separate offense. . . ."

I have stated hereinabove that a mere reading of Section 753, as amended, *supra*, would lead to the conclusion that the tax thereby imposed was on the seller of the articles subject to the tax and not upon the purchaser thereof. However, the provisions of Section 776, as amended, *supra*, shed material light on the nature of the tax imposed by Section 753, *supra*. It is to be noted that Section 776, as amended, *supra*, provides that all persons in the state, who shall sell articles or merchandise subject to the sales tax, shall add to the sales price and collect from the purchaser the amount of tax thereby levied, such amount not to exceed three cents on each dol-

lar of merchandise purchased. This section further provides that it shall be unlawful for any person described in the section to fail or refuse to add to the sales price or collect from the purchaser the amount required by this section to be added to the sales price and collected from the purchaser.

This section further provides that it shall be unlawful for any person described there in to refund or offer to refund all or any part of the amount collected, or to absorb or advertise that he will absorb, or refund the amount required by this section to be added to the sales price and collect from the purchaser, or any portion of such amount. To do any of these things will subject the persons described in Section 776, as amended, supra, to a fine of not less than \$50.00, nor more than \$100.00, or such person may be confined in the county jail for not more than six months, or both.

In my opinion, the provisions of Section 776, as amended, supra, when considered with other provisions of the sales tax law, conclusively show that the sales tax in this State is a consumer's tax, and is such a tax imposed by the State of Alabama that would be deductible under the provisions of Section 385, as amended, supra, in computing a person's net income for income tax purposes.

I have not relied entirely on my construction of the provisions of Section 776 and other provisions of the sales tax law in arriving at this conclusion. The Supreme Court of Alabama, in the case of *Loan Star Cement Corporation v. State Tax Commission*, 234 Ala. 465, 175 So. 399, in considering the nature of the tax imposed by Section 753, supra, had this to say:

"The purchasers in these classes are the ultimate consumers and the legislative intent is to make the sale to the consumer the basis for computing the tax. *State v. Christhlf*, 170 Md. 586, 185 A. 456.

"In truth and in fact the tax can well be denominated a consumer's tax. See section 26."

In the very recent case of *Ross Jewelers, Inc. v. State*, 260 Ala. 682, 72 So. 2d 402, the Supreme Court made an interesting holding as to the nature of the tax imposed by Section 753. This holding is as follows:

"... the tax is laid against the customers of the retailer and not the retailer, the only duty or obligation of the retailer in the present case being to collect the tax from its customers and remit such collections to the State."

Previous opinions of this office are also to the effect that the sales tax is a tax on the consumer and not a tax on the retail merchant. *Quarterly Report of Attorney General*, Vol. 69, page 49, and Vol. 64, page 72.

You are, therefore, advised that the sales tax imposed by the State

should be allowed the taxpayer as a deduction in computing his net income subject to State income tax.

Yours very truly,

JOHN PATTERSON
Attorney General

January 14, 1957

Mrs. Mary J. Thompson
Executive Secretary
Real Estate Commission
Montgomery 5, Alabama

Real Estate Commission—Licenses—Refunds.

A person, who applies for and receives a real estate broker's or salesman's license after payment of the required fee, is not entitled to a refund of the amount paid to the Real Estate Commission as the license fee in the event he decides not to so engage in such business.

Opinion by Assistant Attorney General Bradley.

Dear Mrs. Thompson:

Your request for an official opinion, bearing date of October 11, 1956, is as follows:

"The Commission at meeting held on yesterday directed the undersigned Secretary to request written opinion of the Attorney General as to the following matter:

"The 1951 Alabama Real Estate License Law requires that all licenses expiring at midnight September 30th, each year, must be renewed by and effective October 1st, each year, for the said licensee to continue in business during the new license year. The usual procedure for renewing a license is as follows: Around August 1st, each year the Commission mails out proper printed forms or blanks on which application for renewal must be filed, along with instruction sheets as to filing the application for renewal, the required surety bond and license fee, and calling attention of all licensees that their present license expires midnight September 30th, and they must renew prior to October 1st to continue in business on October 1st. These applications for renewal begin coming back into the Commission usually around the first of September and are processed, that is, the new application is checked to

see if properly filled out, if sworn to, if the proposed place of business of licensee is in business section of his city, if the necessary bond is attached, if license fee attached, and if the broker licensee has included applications for renewal of the licenses of his salesmen. When found in proper order new license certificate is promptly issued and forwarded to the licensee. Meaning that the license for the new year beginning October 1st, is in the hands of the licensees during the month of September and prior to October 1st. The license fees for such licenses issued is usually deposited with the State Treasury around September 27th or 28th, and dated October 1st, in accordance with their required procedure for deposit of revenues for the new fiscal year.

"This year in two instances where applications for renewal of license had been filed, applications processed and license certificates issued and forwarded to the licensees prior to the effective date of the new year and the license fees therefor having been deposited with the State Treasury, said licensees have returned their license certificates and stated they had changed their minds and did not care to be licensed for the new year, making this known to the Commission prior to or on October 1st, the effective date of the new license. Said licensees requesting refund of the license fee upon surrender of the license certificate.

"The Commission respectfully requests an opinion (1) as to whether or not the Commission can refund a license fee where the application for license has been processed, the license certificate issued and delivered to the licensee, and the license fee therefor deposited in the State Treasury. (2) And if this can be done, in what manner said refund can be effected by warrant on the State Treasury for refund of said license fee.

"We are enclosing for your information copy of the 1956 Roster of licensees which includes the 1951 Alabama Real Estate License Law at page 101. We call attention to subsection (d) of Section 10, at page 95; to Administrative Rulings of the Commission relating to renewal of licenses, at page 103; also, regulation, beginning second paragraph from top of page 104."

The answer to your first question is in the negative; consequently, it is unnecessary to answer your second question.

Your request for an opinion recites that the applicant for a real estate license was eligible to receive one; that he paid the exact amount required by law to be paid; and he voluntarily paid said amount and voluntarily asked for the license.

It is well settled law that money voluntarily paid for a license may not be refunded except where it is so provided by statute. **First National Bank**

of *Scottsboro v. Jackson County*, 227 Ala. 448, 150 So. 690; *Board of Revenue & Road Com'rs. of Mobile County, et al. v. Jones*, 236 Ala. 244, 181 So. 908; Biennial Report of Attorney General, 1928-30, page 78.

Act No. 422, General and Local Acts 1951, page 745, does not provide any method for refunding money paid in as a license fee for a real estate broker's or salesman's license.

Therefore, it is my opinion that any one applying for a real estate broker's or salesman's license, and who is otherwise qualified to receive a license, would not be entitled to a refund of the amount paid to the Real Estate Commission as a license fee.

Yours very truly,

JOHN PATTERSON
Attorney General

January 15, 1957

Honorable T. Wilmer Shields
Sheriff, Marengo County
Linden, Alabama

Bonds—Bail

1. A person arrested for a violation of any of the provisions of Title 36, Code of Alabama 1940, except for violations of Act No. 516, General and Local Acts 1949, page 740 (Title 36, Section 58, (1-53), 1955 Cumulative Pocket Part, Code of Alabama 1940), and the violations exempted by Title 36, Section 52, Code of Alabama 1940, as amended by Act No. 517, General and Local Acts 1949, page 574, is entitled to sign his own written bond if the arresting officer deems it otherwise sufficient.
2. The arresting officer should provide the necessary bond forms to be signed by the person arrested.
3. For violations of Act No. 516 (Section 58 (1-53)), supra, Section 49 of Act No. 516, provides the procedure to be followed and kind of bond to be taken by the arresting officer.
4. For the failure to appear pursuant to a bond made under Section 52, as amended, supra, the penalty is a prosecution of said person as for a misdemeanor; for the failure to appear pursuant to a bond given under Section 49 of Act No. 516, (Section 58 (1-53)), supra, the penalty is the forfeiture of the bond.

Opinion by Assistant Attorney General Bradley.

Dear Sir:

Your request for an official opinion bearing date of November 5, 1956, is as follows:

"Subject: Appearance Bonds on Arrests for Traffic Violations.

"As you know, operators of motor vehicles are the subject of arrests by Highway Patrolmen, Deputy Sheriffs, Constables and other Police Officers at any hour of day or night and upon various charges. The type and manner of execution of appearance bonds by persons required to answer the charges for which they are arrested is the subject of much confusion and misunderstanding.

"With regard to persons arrested on charges of reckless driving, speeding or other violations within the provisions of sub-paragraph (a) of Section 52, Title 36 of the 1940 Code, as amended, your opinion on the following questions is respectfully requested:

"1. Is a person arrested for reckless driving, speeding (or violations other than those offenses described in sub-paragraph (b) of Sec. 52, Title 36) entitled to be released from custody upon his own recognizance by his signing a bond, without other surety, to appear at the time and place specified in the summons to be issued to him by the arresting officer?

"2. Is it the duty of the arresting officer to provide the person arrested a bond in proper form for that purpose if an immediate hearing of the charge is not demanded or is not feasible?

"3. May the arresting officer fix the amount of penalty in such bond in such amount as he may in his discretion deem appropriate to the circumstances so long as it does not exceed the amount of \$300.00 as provided in Sec. 58 (49) of Title 36, 1940 Code?

"4. In the event that the person fails to appear at the time and place to which such bond is returnable and the bond is forfeited as provided in Sec. 58 (49) of Title 36, or other applicable requirements, should action be taken to determine whether such appearance bond was wilfully violated within the meaning of Section 52 (a) of Title 36, and if a warrant of arrest for such wilful violation should issue, how should it be issued and returnable?"

1. Title 36, Section 52, Code of Alabama 1940, as amended by Act No. 517, General and Local Acts 1949, page 754, provides, in pertinent part, as follows:

"(a) Whenever any person is arrested for a violation of any provisions of this title punishable as a misdemeanor, the arresting officer shall, unless otherwise provided in this section, take the name and address of such person and the license number of his motor vehicle and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice, and such person shall, if he so desire, have a right to an immediate hearing or a hearing within twenty-four (24) hours at a convenient hour and such hearing to be before a magistrate within the county or city where such offense was committed. Such officer shall thereupon and upon the giving by such person of a sufficient written bond, approved by the arresting officer, to appear at such time and place, forthwith release him from custody."

It will be noted that said section provides that the arresting officer shall require a sufficient written bond approved by the said officer to appear at a particular place at a certain time, should said person elect not to be immediately tried.

Therefore, it is my opinion that a person arrested for a violation of any of the provisions of Title 36, Code of Alabama 1940, and as amended, except for violations of Act No. 516, General and Local Acts 1949, page 740 (Title 36, Section 58 (1-53), 1955 Cumulative Pocket Part, Code of Alabama 1940), and those violations exempted by Section 52, as amended, supra, is entitled to sign his own written bond if the arresting officer deems it otherwise sufficient.

2. The answer to your second question is in the affirmative.

You will note that the pertinent part of Section 52, as amended, supra, provides that, upon the giving of the bond, the officer shall forthwith release said person from his custody. To accomplish this duty, the arresting officer must have the proper bond forms at his disposal.

3. To answer your third question, I must first point out that Section 52, as amended, supra, provides the procedure for the arresting officer to follow as to violations of all the provisions of Title 36, except Act No. 516 (Section 58 (1-53)), supra. Please keep in mind that Section 49 of Act No. 516 (Section 58 (1-53)), supra, relates only to those offenses provided for in said Act, whereas Section 52, as amended, supra, applies to all the other provisions of Title 36, supra. Section 49 of Act No. 516 (Section 58 (1-53)), supra, provides the procedure for taking an appearance bond for violations of said Act, and does not apply to any other provisions of Title 36.

Section 49 of Act No. 516 (Section 58 (1-53)), supra, provides as follows:

"Any peace officer, including highway patrolmen, sheriffs, and their deputies, constables and their deputies, police officers and marshals of cities or incorporated towns, county police or patrols, state or county license inspectors and their deputies, and special officers appointed by any agency of the State of Alabama for the enforcement of its laws re-

lating to motor vehicles, now existing or hereafter enacted, shall be authorized, and it is hereby made the duty of each of them to enforce the provisions of this Act and to make arrests for any violation or violations thereof, without warrant if the offense be committed in his presence, and with warrant if he does not observe the commission of the offense. If the arrest be made without warrant, the accused may elect to be immediately taken before the nearest court having jurisdiction whereupon it shall be the duty of the officer to so take him. If the accused elect not to be so taken, then it shall be the duty of the officer to require of the accused a bail bond in a sum not to exceed three hundred dollars (\$300), conditioned that the accused binds himself to appear in the nearest court having jurisdiction at the time fixed in the bond. In case the arrested person fails to appear on the day fixed, the bond shall be forfeited in the manner as is provided for the forfeiture of bonds in other cases. No officer shall be permitted to take a cash bond. The officer making the arrest and taking the bond shall report the same to the court having jurisdiction within eighteen (18) hours after taking such bond."

For a violation of Act No. 516 (Section 58 (1-53)), supra, the arresting officer, upon the election of the person arrested not to be immediately tried, shall require a bail bond in a sum not to exceed \$300.00, conditioned to appear at a time and place designated in the bond.

Therefore, the officer arresting a person for a violation of Act No. 516 (Section 58 (1-53)), supra, may fix the amount of the bail bond so long as that amount does not exceed \$300.00.

4. The answer to your fourth question is in two parts:

(a) For the violation of a bond made pursuant to the provisions of Section 52, as amended, supra, the penalty is prosecution for a misdemeanor. This is a separate and distinct charge from the one which the person was originally booked on.

A person has prima facie violated his bond when he does not appear as directed in said bond; however, he may show circumstances or events that would exonerate him from the charge of violating his appearance bond. But that is a question for the court to decide.

The warrant should be issued and returned as any other warrant for a misdemeanor is issued and returned. The charge is violation of an appearance bond, issued out of and made returnable, usually to the court to which the bond was made returnable.

(b) For a violation of a bond given pursuant to Section 49 of Act No.

516 (Section 58 1-53)), supra, the penalty is forfeiture of the bond. There is no other penalty provided in said section.

Very truly yours,

JOHN PATTERSON
Attorney General

January 25, 1957

Honorable J. R. Wilson
Chief Clerk
Probate Office
Calhoun County
Anniston, Alabama

Filing Tax.

1. A lease agreement is subject to the filing tax as provided in Title 51, Section 618, Code of Alabama 1940, as amended by Act No. 769, General and Local Acts 1953, page 1029.
2. An option to purchase is not subject to the filing tax.
3. A lease agreement with an option to purchase contained therein is subject to filing tax only on that part which is deemed to be the lease.
4. The amount of the filing tax of a lease must be determined by the probate judge.

Opinion by Assistant Attorney General Bradley.

Dear Sir:

Your request for an official opinion bearing date of November 20, 1956, is as follows:

"Enclosed is a photostatic copy of a lease filed in the Probate Office in Calhoun County, Alabama.

"The charges of \$39.25 were paid under protest.

"I want to know if the amount charged was correct or incorrect, and, if incorrect, what would be the proper charge?"

A photostatic copy of the lease agreement in question was enclosed with your request for an opinion from this office. After reading said instrument, it is my opinion that same is a lease agreement for three years with an option to purchase upon the payment of a stipulated sum. The instrument stipulated that an amount of \$1250 was to be paid down, an amount of \$9600 was to be paid in monthly installments over the period of the lease, and there was to be a final payment of \$29,150 at the end of said term, should the lessee desire to accept a deed to said property. It is provided in said instrument that in the event the lessee should not want to exercise his option to purchase the property, then the money presently paid should be considered as rent.

The instrument was recorded and the amount ascertained to be due as deed tax by the Probate Judge was paid under protest. The Probate Judge computed the amount due on the basis of \$40,000, the total consideration recited for a transfer of the property.

It is my opinion that the instrument in question is a lease agreement with an option to purchase thereby coming within the purview of Title 51, Section 618, Code of Alabama 1940, as amended by Act No. 769, General and Local Acts 1953, page 1029, which provides for a filing tax on any instrument "which conveys any real or personal property within this state, or which conveys any interest in such property." Biennial Report of Attorney General, 1932-34, page 568; Quarterly Report of Attorney General, Vol. 14, page 99; Vol. 27, page 65; Vol. 55, page 54; Vol. 60, page 40.

The provision in the lease agreement allowing the lessee to make the final payment of \$29,150 and in turn receive a deed to said property is nothing more than an option to purchase. Therefore, on that part of the instrument in question, which is considered no more than an option to purchase, there would be no filing tax. Quarterly Report of Attorney General, Vol. 16, page 166, and Vol. 19, page 314.

It seems to me that the filing tax on the instrument in question would be based on that part of the instrument which is considered to be the lease.

It is now well settled that the determination of value of the property from which the amount of filing tax is ascertained is a question directed to the probate judge acting in his judicial capacity. Vol. 14, page 99, *supra*. It has also been decided that the filing tax on a lease is computed on the basis of the cash value of the interest conveyed at the time of the conveyance. See Vol. 14, page 99, *supra*.

Since the probate judge must determine the value of the property for the purpose of ascertaining the amount of tax due, I can only suggest that you add the \$1250 paid down and the \$9600 to be paid over the life of the lease and apply the method suggested in the case of **Reiter Connolly Manu-**

facturing Company v. Hamlin, 144 Ala. 192, 40 So. 280, to arrive at the cash value of the interest conveyed. From this value, you will compute the amount of filing tax due.

Again let me say that the suggestion made above is to be taken by you as an aid only, inasmuch as you are the officer charged with the duty of ascertaining the cash value of the property or interest therein which was conveyed.

Consequently, I cannot answer your question directly; but what I have said above will, I believe, assist you in arriving at the correct amount of filing tax to be collected on the instrument in question.

Yours very truly,

JOHN PATTERSON
Attorney General

February 5, 1957

Honorable R. D. Dickson
Mayor
City of Albertville
Albertville, Alabama

Municipalities—Officers and Offices—Housing Authority.

1. One may not hold the office of commissioner of the Housing Authority of the City of Albertville and at the same time hold the office of member of the Municipal Utilities Board of Albertville.
2. One may not hold the office of the commissioner of the Housing Authority of the City of Albertville and at the same time hold the office of member of the Board of Adjustment of the City of Albertville.
3. One way not hold the office of commissioner of the Housing Authority of the City of Albertville and at the same time hold the office of member of the Planning Commission of the City of Albertville.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, bearing date of January 10, 1957, is as follows:

"Section 8 of Title 25 Ala. Code of 1940 provides that none of the commissioners of a municipal housing authority 'may be city officials.' We would appreciate your opinion on the following questions.

"1. May a person be a commissioner for the Housing Authority for the City of Albertville, Alabama, and also be a member of the Municipal Utilities Board of Albertville which was organized by Act No. 287 passed and approved the 11th day of May, 1943.

"2. Is a member of the Board of Adjustment of the City of Albertville as provided for in Section 781 of Title 37 Ala. Code of 1940, eligible to be a commissioner of the Housing Authority of the City of Albertville.

"3. Is a member of the Planning Commission of the City of Albertville as is provided in Section 788 of Title 37 Ala. Code of 1940, eligible to be a commissioner of the Housing Authority of the City of Albertville.

"Your usual prompt attention to this matter will be appreciated."

All your question are answered in the negative.

As pointed out in your request, Title 25, Section 8, Code of Alabama 1940, provides that a commissioner of a municipal housing authority may not be a city official.

Broadly speaking, a municipal official is one holding a municipal position of trust and responsibility with definite municipal powers, duties, and privileges. 62 C. J. S., Municipal Corporations, Section 462. Each municipal position must be examined separately in order to determine whether one who holds that position is a municipal official.

The Municipal Utilities Board of Albertville was created by Act No. 287, Local Acts 1943, page 165. It is the duty of this board, under said act, to operate the public utilities owned by the City of Albertville and the members of said board are appointed by the city council of the City of Albertville. Therefore, I am of the opinion that a member of said board is a municipal official.

The Board of Adjustment of the City of Albertville was created by your city governing body by virtue of Title 37, Section 781, Code of Alabama

1940, and was given the power by said governing body to make special exceptions to the terms of zoning ordinances of the City of Albertville. Therefore, I am of the opinion that a member of said board is a municipal official.

The Planning Commission of the City of Albertville was created by municipal ordinance in accordance with the provisions of Title 37, Section 787, Code of Alabama 1940. Cf. Quarterly Report of Attorney General, Vol. 29, page 52.

Title 37, Section 788, Code of Alabama 1940, as amended by Act No. 446, General and Local Acts 1955, page 1000, reads, in part, as follows:

"... All members of the commission shall serve as such without compensation, and the appointed members shall hold no other municipal office, except that one of such appointed members may be a member of the zoning board of adjustment or appeals . . ."

Therefore, I am of the opinion that a member of said planning commission is a municipal official.

Premises considered, I am of the opinion that one may not hold the office of member of the Municipal Utilities Board of Albertville, member of the Board of Adjustment of the City of Albertville, or member of the Planning Commission of the City of Albertville and, at one and the same time, hold the office of commissioner of the Housing Authority of the City of Albertville.

Yours very truly,

JOHN PATTERSON
Attorney General

February 21, 1957

Hon. R. B. Searcy
Mayor
City of Huntsville
Huntsville, Alabama

Constitutionality—Municipalities.

1. In the absence of express statutory authority given by the legislature, a municipality cannot establish, maintain and operate an off-street parking facility.

2. The legislature may vest municipalities with authority to establish, maintain and operate an off-street parking facility.
3. The legislature may vest municipalities with authority to pledge parking meter receipts to finance the acquisition of off-street parking facilities.
4. In the absence of express statutory authority given by the legislature, a municipality may not create a separate corporation with authority to acquire, operate and pay for an off-street parking facility.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, bearing date of January 3, 1957, is as follows:

"We are in a very serious situation regarding our parking in the City of Huntsville, Alabama, and it would be appreciated very much by me as Mayor, if you would give me your official opinion on the following questions:

"1. Does the City of Huntsville have authority to acquire land, by condemnation or otherwise, necessary to establish, maintain and operate an off-street public parking facility?

"2. If the answer to question No. 1 is 'No,' may such authority be vested in the City of Huntsville by a general act of the State Legislature?

"3. If the City of Huntsville has, or may be vested with power, to acquire the necessary land to maintain and operate a public off-street parking facility, may the City pledge parking meter receipts for the payment of warrants or bonds issued for the purpose of acquiring off-street parking facilities?

"4. May the City of Huntsville by ordinance establish a parking authority which would have the power to issue warrants or bonds to secure funds to acquire a site for the operation of an off-street parking facility, and to pledge in repayment thereof the revenue from its operation and parking meter revenues, without such indebtedness being applied against the City's debt limit?

"Your usual cooperation in this matter will be greatly appreciated."

None of the questions contained in your request has heretofore been considered by the appellate courts of this state or this office.

A municipal corporation is a mere instrumentality of the state and its powers are derived from and must be conferred by the legislature. *Town of Graysville v. Johnson*, 33 Ala. App. 479, 34 So. 2d 708. A municipality may exercise only those powers granted in express words, those necessarily or fairly implied in or incident to powers expressly granted, or those essential to the declared objects and purposes of the corporation. *City of Bessemer et al. v. Huey*, 247 Ala. 12, 22 So. 2d 325; *Johnson v. City of Sheffield et al.*, 236 Ala. 411, 183 So. 265.

There is no statute in this state which expressly confers the power upon municipalities to establish, maintain or operate an off-street public parking facility, and there is no statute from which such power can be implied.

Therefore, your first question is answered in the negative.

Although there are some cases to the contrary, the appellate courts in most jurisdictions, wherein the problems here under consideration have been the subject of litigation, have upheld statutes enacted by state legislatures granting authority to municipalities to establish, maintain and operate off-street parking facilities. See cases cited in annotation in 8 A.L.R. 2d 373.

The Supreme Court of Pennsylvania in the case of *McSorley v. Fitzgerald*, 359 Pa. 264, 59 Atl. 2d 142, said in part:

"What the court holds, therefore, is that where, as here, the contemplated use of property is in aid of, and ancillary to, the exercise of the police power, the public nature of such use is conclusively determined, and therefore the State may, where the use of the highways is hampered by a local lack of parking facilities, authorize the municipal acquisition and operation of publicly owned and operated parking facilities reasonably calculated to alleviate that condition. Indeed, such a project is but a mild advance on the existing plan employed by many municipalities of designating individual parking spaces on the streets and making a charge for such facilities through the use of parking meters."

It is interesting to note that the Supreme Court of Alabama in 1948, in the case of the *City of Decatur v. Robinson et al.*, 251 Ala. 99, 36 So. 2d 673, held that a municipality is authorized to install and operate parking meters upon its streets. The court based this authority upon the police power possessed by a municipality to regulate traffic on its streets. Eleven years earlier, the same court held that this authority was not possessed by a municipality. See *City of Birmingham v. Hood McPherson Realty Co.* 233 Ala. 352, 172 So. 114.

In the light of the trend of the authorities cited, *supra*, your second question is answered in the affirmative.

As shown above, I am of the opinion that the Constitution of Alabama 1901 does not prohibit the legislature from vesting municipalities with authority to establish, maintain and operate off-street parking facilities. I know of no constitutional prohibition against a municipality pledging parking meter receipts for the payment of warrants or bonds issued to finance the establishment of off-street parking facilities.

Therefore, in answer to your third question, I am of the opinion that the legislature may vest your city with authority to pledge its parking meter receipts to the payment of warrants or bonds issued for the purpose of acquiring off-street parking facilities.

No statute in this state authorizes a municipality to create a separate corporation with the authority to acquire, operate and pay for an off-street parking facility.

Therefore, your fourth question is answered in the negative.

Yours very truly,

JOHN PATTERSON
Attorney General

March 11, 1957

Hon. Bankhead Bates, Chief
Driver License Division
Department of Public Safety
State of Alabama
Montgomery 2, Alabama

Public Safety Department—Driver's License—Appeals.

1. An administrative hearing is not complete until the Director of Public Safety has formally ruled on the evidence received.
2. An appeal to the courts will not lie until the hearing has been completed.

Opinion by Assistant Attorney General Webb.

Dear Sir:

Your request for an official opinion bearing date of February 20, 1957, is as follows:

"This office would like an opinion for guidance in cases similar to the one enclosed. In other words, has a person exhausted his administrative remedies if he files a petition before the Director renders a decision on an administrative hearing which has been given to the subject?"

In reference to the above request, my opinion is that the petitioner has not exhausted his administrative remedies available to him and is, therefore, not legally in court.

Title 36, Section 68, Code of Alabama 1940, provides in part:

"... Upon such hearing the director of public safety or his duly authorized agent shall either rescind his order of suspension or, good cause appearing therefor, may extend the suspension of such licensee or revoke such license. If the hearing is conducted by a duly authorized agent instead of by the director of public safety himself, the action of such agent must be approved by the director of public safety."

The above-quoted section of the Code goes further and provides for the appeal to the courts from an objectionable ruling by the Director. The administrative hearing has been held to be mandatory before an appeal may be taken to the courts. The Court of Appeals in so holding, further stated:

"The action of the Director in revoking, or suspending a driver's license is a judicial act, and the right to petition a court is an appeal from an order of an administrative officer acting in a judicial capacity. Ex parte State ex rel. Sullivan, etc. (Ala. Sup. Ct.), 78 So. 2d 322." Ex parte State ex rel. Bill Lyerly as Director Department of Public Safety, (Ala. Ct. of App.), 91 So. 2d 233.

In the case of *State v. Pollock*, 251 Ala. 603, 38 So. 2d 870, an appeal from the Department of Revenue was in question and the court held:

"To support an appeal to another court for trial de novo, there must be a judgment of a final sort pronounced in respect to a matter over which the tribunal has jurisdiction."

Based on the above rules of law, it is my opinion that a hearing which is incomplete and contains no formal ruling by the Director based on the evidence before him is not a final sort of judgment from which an appeal may be taken and any appeal which is taken is premature and subject to dismissal for lack of jurisdiction.

Very truly yours,

JOHN PATTERSON
Attorney General

March 12, 1957

Hon. E. J. Reid
Clerk-Treasurer
City of Irondale
Irondale, Alabama

License Taxes—Plumbers—City of Irondale—Opinions Over-ruled.

1. The plumber's license levied under Article H of Ordinance No. 101 of the City of Irondale, approved December 29, 1955 for the 1956 and 1957 years is a license tax for the purpose of raising revenue and is not a regulatory law enacted under the police powers.

2. Any person who is engaged in the plumbing business in the City of Irondale, Alabama is liable for the license tax or fee levied under Article H of City Ordinance No. 101, approved December 29, 1955, for the years 1956 and 1957, even though he is not a qualified and registered master plumber under Act No. 529 of the 1949 Regular Session (Gen. Acts 1949, p. 827).

3. Where said City license has been paid by any person engaged in the plumbing business in the City of Irondale, such person is entitled to have issued to him by the City as a receipt therefor a privilege license, irrespective of the fact that he is not a qualified and registered master plumber as contemplated by Act No. 529, supra.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion bearing the date of November 14, 1956, is as follows:

"We have had some discussion with the Board of Plumbers Examination and Registration concerning the required qualifications of the Plumbing profession to warrant their being issued a privilege license to do plumbing in our City. They tell us that their construction of Act No. 529, 1949 regular session is that none but a Master Plumber should be issued a license. We have read this Act 529, also we have before us a photostatic copy of your letter of December 16, 1955, addressed to Hon. John R. Stewart, vice president of the Board in which you state, in effect, that a license should not be issued for plumbing, by a municipality, to anyone who has not been qualified by the Board.

"We have been allowing a license to Journeymen Plumbers in the past, but if they are not eligible for a privilege license, we do not want to issue one for the coming yera. Will you please write us and give us, in direct phrasing, information as to whether or not a Journeyman Plumber should be issued a privilege license to do plumbing."

The city license to which you refer is found in the City License Code as Ordinance No. 101 of the City of Irondale, Alabama, which Ordinance was approved December 29, 1955, for the years 1956 and 1957.

This Ordinance, insofar as it is material to your inquiries, provides as follows:

"An ordinance to prescribe and fix licenses for businesses, occupations and professions in the City of Irondale, Alabama, and within the police jurisdiction of said City for the years 1956 and 1957, such licenses to be due and payable on the first day of January of each year or at the commencement of said business, if commenced after January 1.

* * * *

"Article H. Plumbing, gas fitting, steam and hot water heating, steam and furnace contractors, doing any or all such work—license fee \$25."

The license then required by the ordinance covers those persons engaged in the plumbing business in the City of Irondale, Alabama. It contains no regulatory provision or requirements which have to be met before any such person may procure the license, but simply provides that "plumbing, gas fitting, steam and hot water heating, steam and furnace contractors, doing any or all such work," shall pay a license tax or fee of \$25 a year.

The license then issued by the City upon the payment of the license tax would be nothing more than a receipt or evidence of the payment of the tax for the year involved. Anyone who engages in such a business and who pays the license tax levied under Article H of Ordinance No. 101, *supra*, would clearly appear to be entitled to such a receipt.

The law which is referred to by the Board of Plumbers Examination and Registration and which prescribes the requirements and conditions which must be met by a plumber before he is entitled to be issued a permit as a master plumber by the Board, is Act No. 529 of the 1949 Regular Session of the Legislature, approved September 2, 1949 (Gen. Acts 1949, p. 827). It is an entirely different type of law from the license tax provisions of City Ordinance No. 101, *supra*, which levies a tax on all plumbers engaged in that business in the City of Irondale.

Act No. 529, *supra*, is very clearly a regulatory law which has been enacted by the Legislature under the police powers of the State. This Act also provides for the administration and enforcement of such regulatory

law and makes it a misdemeanor for anyone to engage in or carry on a plumbing business in this State without having a permit from the Board of Plumbers Examination and Registration as a master plumber, or who otherwise violates the provisions of said Act No. 529.

A careful reading of City Ordinance No. 101, *supra*, and of Act No. 529, *supra*, reveals that these two laws are independent of each other, and that they are not by reference or otherwise related.

The courts and other legal authorities recognize a very clear distinction between a tax, whether it be a license tax or other kind of tax which is for the purpose of raising revenue to defray the expenses of government, and a license or permit which authorizes one to lawfully do a certain act (i.e., to engage in the plumbing business), issued under the police powers of the State. Quarterly Report of Attorney General, Vol. 48, page 121; *Casmus v. Lee*, Comptroller, 236 Ala. 396, 183 So. 185, 118 A.L.R. 822, 827; *State v. V. G. Overby et al.*, _____ Ala. _____ (1956), 89 So. 2d 525; *City Council of Montgomery v. Kelly*, 142 Ala. 552, 38 So. 67, 68; *Giamalva v. Cooper, Collector of Revenue, et al.*, 217 La. 979, 47 So. 2d 790, 33 Am. Jur. 339, Sec. 19 and 51 Am. Jur. 46. Sec. 13.

In *State v. Commercial Loan Co.*, 251 Ala. 672, 38 So. 2d 571, 573, 574, the Supreme Court of Alabama very clearly drew this distinction as follows:

"A license tax is 'either a license strictly so called imposed in the exercise of the ordinary police power of the State, or it is a tax, laid in the exercise of the power of taxation.' ****"

"In other words, the excise tax is on the business that may be carried on and does not necessarily imply a license. *Casmus v. Lee*, 236 Ala. 396, 183 So. 185, 118 A.L.R. 822." (Emphasis supplied.)

Much the same argument as is advanced by the Board of Plumbers Examination and Registration in this matter was answered by the Supreme Court of Louisiana in *Giamalva v. Cooper, Collector of Revenue, et al.*, 217 La. 979, 47 So. 2d 790, 792, as follows:

"This argument is unsound for a number of reasons. In the first place, it must, of necessity, disregard the plainly expressed intention of the Legislature that payment of the tax does not authorize or legalize the business made subject thereto. Moreover, it completely overlooks the difference between licenses or privileges to engage in certain businesses or pursuits which are subject to regulation under the police power, and a license or excise tax levied solely for revenue under the taxing power of the government.

"That the sovereign may tax that which it prohibits is not open to serious question. This doctrine may seem paradoxical to some but any doubts as to its soundness stem from a misconception of the nature of a tax. 'Taxes are not favors; they are burdens . . . ' *Youngeblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654. Taxes levied on business for revenue do not have for their purpose the licensing of the business; they are laid as excises upon the doing of the business, whether lawfully or unlawfully conducted. *Cooley*, *The Law of Taxation*, 4th Ed., Vol. 1, Sections 26 and 27 and authorities there cited; 53 *Corpus Juris Secundum*, *Verbo Licenses*, §28, page 557; *License Tax Cases*, 5 Wall. 462, 18 L. Ed. 497; *United States v. Jin Fuey Moy*, 241 U. S. 394, 36 S. Ct. 658 (among numerous other cases cited)." (Emphasis supplied.)

The decision of Supreme Court of Alabama in *Casmus v. Lee*, *Comptroller*, *supra*, and *State v. Overby et al.*, *supra*, are practically to the same effect and recognize the same principles.

The foregoing being considered, my answer to your question is in the affirmative.

Any person who is engaged in the plumbing business in the City of Irondale or who is carrying on any of the activities which are described in Articles H of the City license laws, is liable for the payment of the \$25 license tax or fee provided for therein. Upon payment of this tax, such person is entitled to a receipt upon the prescribed privilege license forms as evidence of such payment. This would be true regardless of whether such a person is a qualified and registered master plumber or whether he is a so-called journeyman plumber or whether he is otherwise engaged in the plumbing business, as described in said City Ordinance, in the City of Irondale.

Very truly yours,

JOHN PATTERSON
Attorney General

March 21, 1957

Honorable Charles C. McWhorter
Chairman, Board of Revenue
Lawrence County
Moulton, Alabama

Jurors and Juries—Jury Commission—Lawrence County.

1. Term year for members of jury commissions runs from the

first Monday after the second Tuesday in January until the same time in the following year.

2. The Jury Commissioners in Lawrence County may not receive over five hundred dollars (500.00) each for their services for any one year of their term.

3. The Clerk of the Jury Commission in Lawrence County cannot receive for his services over six hundred dollars (\$600.00) in any one year, which year runs from the first Monday after the second Tuesday in January until the same time in the following year.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of March 11, 1957, is as follows:

"The three members of the jury commission of Lawrence County and the Clerk of the commission have each filed a claim with the Board of Revenue of Lawrence County, Alabama, for \$500.00, making a total of 2,000.00 claimed and based their claims upon the following authority:

Under date of January 3, 1957, the Honorable S. A. Lynne, one of the Judges of the Eighth Judicial Circuit made and entered the following order:

" 'MESSRS. OTIS GENTRY, PAUL G. HORTON AND CULLIE MARTIN, JURY COMMISSIONERS OF LAWRENCE COUNTY, ALABAMA, COURT HOUSE
MOULTON, ALABAMA.

"Gentlemen:

"This acknowledges the receipt of your unanimous request for an order authorizing the refilling of the jury box of Lawrence County, Alabama. Your request is accompanied with a recital of facts evidencing the propriety and necessity for such refilling, and the court being cognizant of matters recently occurring in court when held in Moulton, Alabama disclosing such necessity, and it appearing to the undersigned as one of the Judges of the 8th Judicial Circuit of Alabama, sitting for the County of Lawrence, that it is expedient and necessary to forthwith refill the jury box of Lawrence County, Alabama.

"It is therefore hereby ORDERED AND ADJUDGED that you convene

as the Jury Commission of Lawrence County, Alabama and empty and refill the jury box of said county.

"It is FURTHER ORDERED that in the refilling of said jury box you do so in strict compliance with the provisions of Chapters 1 and 2 of Title 30 of the Code of Alabama."

"The claims filed recite that each of the claimants performed 50 days work under said Court order at \$10.00 per day between January 7, 1957, and March 8, 1957.

"On October 9, 1956, these same jury commissioners and clerk filed a like claim with the Board of Revenue reciting 50 days work between August 1, 1956, and September 30, 1956, at \$10.00 per day for a total of \$500.00 each, which claim was approved and paid. In December, 1956, the clerk of the jury commission filed an additional claim for 10 days additional work at \$10.00 per day, for \$100.00, which claim was approved and paid.

"The undersigned has referred to Sections 12 and 15 of Title 30 of the 1940 Code of Alabama, as amended, and is under the impression that in a County the size of Lawrence, which has a population of approximately 27,000, the maximum payable is \$500.00 per year for the commissioners and \$600.00 per year for the clerk.

"Also, in the preparation of the budget for the general fund of Lawrence County for the year 1956, 1957, which commenced on October 1, 1956, there was an item placed therein for compensations for the jury commission and clerk totaling \$2,100.00. As stated above, this total amount has already been expended and there are no funds in the general fund set up for the payment of any additional compensation to the jury commission, nor does the County's general fund have any surplus or unallocated funds which could be used for this purpose.

"It will be appreciated if you will render an official opinion as to the legality of the above mentioned claims and as to whether or not the Board of Revenue of Lawrence County can legally pay the same."

It is provided by Title 30, Section 10, Code of Alabama 1940, that the Governor shall appoint the members of the several jury commissions, who shall constitute said several commissions during the Governor's tenure of office.

This office has heretofore ruled that the term of office of the commissioners is definitely fixed at four years, and they hold office during the Governor's tenure of office and until their successors are appointed and qualified. In other words, their term of office coincides with that of the Governor himself who appoints them. Quarterly Report of Attorney General, Vol. 32, page 149; Vol. 46, page 79.

To like effect, but in more detail, is the opinion of this office which holds that the year of a member's term is from the first Monday after the second Tuesday in January to and including the first Monday after the second Tuesday in January of the succeeding year. Quarterly Report of Attorney General, Vol. 15, page 249.

This is in line with *Oberhaus v. State, ex rel, McNamara*, 173 Ala. 483, 55 So. 898, which held that Governor Comer's term of office *de jure* expired at midnight on Monday, January 16, 1911; and consequently, Governor O'Neal's term *de jure* began on and with the Tuesday following.

Section 12, Title 30, Code of Alabama 1940, as amended by Act No. 743, General and Local Acts 1953, page 1006, provides as follows:

"Each member of the jury commission shall be paid the sum of ten dollars per day for the time actually engaged in the discharge of his duties as such member, to be paid out of the county treasury upon the warrant of the probate judge of the county. Such warrant shall be issued by such probate judge upon evidence satisfactory to him that such service has been rendered; but the compensation of each member of the commission shall not exceed for any year of his term the following amounts: In counties of twenty-five thousand population or less, two hundred dollars; in counties exceeding twenty-five thousand and not exceeding fifty thousand population, five hundred dollars; in counties having a population of more than fifty thousand, the maximum amount payable shall be six hundred dollars or the amount prescribed by local law or a general law of local application based on population, whichever is greater." (Emphasis supplied)

The population of Lawrence County according to the last federal census is 27,128. The maximum, therefore, that a jury commissioner in Lawrence County may receive as pay for his service as such is five hundred dollars, "for any year of his term."

The second year of the jury commissioners' term began on January 17, 1956, and ended at midnight January 14, 1957. Only the maximum of five hundred dollars may be paid any one jury commissioner for services rendered during this period of time. Since it appears from your request that each of the jury commissioners has already been paid five hundred dollars for services rendered between August 1, 1956, and September 30, 1956, they could receive no additional pay for their services on any day or days between January 7, 1957, and January 15, 1957.

The third year of the jury commissioners' term began on January 15, 1957. They may be legally paid, therefore, for the work performed on that day and all other days up to and including March 8, 1957, subject, however, to the maximum of five hundred dollars.

Title 30, Section 15, Code of Alabama 1940, as amended by Act No. 528, General and Local Acts 1955, page 1175, insofar as here pertinent, provides:

"In counties having sixty thousand population or less by the last federal census preceding the employment, the clerk of the circuit court may be employed as the clerk of the jury commission and in such counties the clerk of the jury commission, whether he be the clerk of the court or not, shall be paid for his services rendered under the direction of the jury commission the sum of ten dollars per day while actually engaged in performing his duties, to be paid out of the county treasury upon the order of the president of the jury commission . . . In counties having a population of sixty thousand, or less, according to the last preceding federal census, the clerk of the jury commission shall not receive more than six hundred dollars as compensation for his services in any one year."

What is the meaning of "any one year" as used in Section 15, as amended, *supra*? The term of office of a circuit clerk is six years from the first Monday after the second Tuesday in January next after his election, and until his successor is elected and qualified. Title 41, Section 16, Code of Alabama 1940. The circuit clerk may act as clerk for the jury commission. The beginning and ending of his yearly term of office is the same as that of the jury commissioners during their term of office. I am of the opinion, therefore, that "any one year" has the same meaning as that hereinabove given as to "any year of his term" as applied to jury commissioners.

In view of the above, the clerk also may not be paid for his services between January 7, 1957, and January 15, 1957. He may be paid, however, for the work performed on that day and all other days up to and including March 8, 1957. Since he has already been paid six hundred dollars for services rendered between August 1, 1956, and September 30, 1956, and in December 1956, any additional payment to him for services performed between January 7, 1957, and January 15, 1957, would result in the clerk receiving more than six hundred dollars in any one year, which is prohibited by Section 15, as amended, *supra*.

Yours very truly,

JOHN PATTERSON
Attorney General

March 28, 1957

Honorable J. H. Newman
Interim President
University of Alabama
University, Alabama

Taxation—Sales Tax—University of Alabama.

1. University of Alabama, an agency or instrumentality of the State of Alabama, is not required to collect or pay Sales Tax to the State Department of Revenue or to the Tuscaloosa County Special Tax Board except in regard to certain athletic contests.
2. Opinion reported in Quarterly Report of the Attorney General, Vol. 69, page 49, overruled insofar as in conflict herewith. Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an opinion bearing date of March 2, 1957, is as follows:

"Reference is made to the case of the City of Anniston Vs. the State of Alabama recently decided by the Supreme Court and reported in 91 So. 2d 211. Heretofore the University of Alabama has collected State and County Sales Tax on sales of tangible personal property in its Supply Store and Cafeteria on the main campus at Tuscaloosa, Alabama and the Medical Center in Birmingham, Alabama. It has also collected State and County Sales Tax on admissions to the University Theatre. These collections have been made under Article 10, Title 51 of the 1940 Code of Alabama as amended and under Act No. 56 of the 1953 legislature.

"In view of the above ruling and particularly as interpreted by Sales and Use Tax Rule G 27-021 promulgated by the State Department of Revenue, questions have arisen as to whether sales tax referred to above should continue to be collected and paid by the University of Alabama. Your attention is invited to a previous opinion rendered by your office on November 18, 1952 prior to the above opinion of the Supreme Court and reported in Quarterly Reports of the Attorney General, Vol. 68 (Sic 69) at page 49.

"I would, therefore, like your opinion upon the following questions:

"1. Is the University of Alabama required to collect or pay to the State Department of Revenue Sales Tax on any sales of tangible personal property which it may make through its University Supply Store, on meals served by its University Cafeteria or its University Hospital

cafeteria, or on admissions to its Theatre production, its concert-lecture series, or its student government association dances or entertainment?

"2. Is the University of Alabama required to collect or pay to the Tuscaloosa County Special Tax Board, under Act No. 56 of the 1953 Legislature of Alabama, tax on any sales of tangible personal property which it may make through its University Supply Store, on meals served by its University Cafeteria, or its University Hospital cafeteria, or on admissions to its theatre productions, its concert-lecture series, or its student government association dances or entertainment?

"In view of the fact that Sales Tax collections are now being made by the University as set out above, we would appreciate an early opinion on this question."

In the case of *City of Anniston v. State of Alabama*, 91 So. 2d 211, it was held that a city was not required to collect sales tax from customers using the city's five (5) swimming pools and golf courses in view of the absence of specific coverage of municipalities by the sales tax statute except in regard to certain athletic contests. In so holding the court stated:

"The question for decision in this case is whether the legislature has placed upon cities, agencies and instrumentalities the duty of collecting a sales tax from persons who pay admission fees to use municipally owned and operated golf courses and swimming pools."

After quoting from the provisions of Title 51, Sections 752 and 753, as amended, Code of Alabama 1940, the Court further stated:

"We do not find in the provisions quoted above or in any other applicable statutory provision where cities are expressly named among those who are required to collect the tax levied by the provisions of §753, Title 51, Code 1940. On the other hand, in subsection (b) of the section last referred to we find language which we think clearly demonstrates that it was not the legislative purpose for the tax to be collected by cities except in regard to athletic contests, such as wrestling matches, prize fights, boxing and wrestling exhibitions, football and baseball games. We have reference to the language included in the parenthetical clause of subsection (b) of §753, Title 51. If it had been the legislative purpose to require municipalities to collect the tax in all respects there would have been no need for the language included in the parenthetical clause."

While the opinion in the *City of Anniston* case, *supra*, deals only with a city and its agencies and instrumentalities, it is my judgment that the principle established in that case is also applicable to the University of Alabama.

It is, therefore, my opinion that the University of Alabama, an agency or instrumentality of the State of Alabama, is not required to collect or pay to the State Department of Revenue sales tax in connection with the operation of the activities specified in question No. 1 of your inquiry.

The pertinent provisions, except as to rate, of the Tuscaloosa County Sales Tax law, Act No. 56, General Acts 1953, p. 76, are identical with and parallel the provisions of the State sales tax law. It is, therefore, my opinion that the University of Alabama is not required to collect or pay to the Tuscaloosa County Special Tax Board sales tax in connection with the operation of the activities specified in question No. 2 of your inquiry.

The above conclusions are based on the assumption that the specified activities are operated or conducted by the University or an agency thereof.

In so far as it conflicts with this opinion, the opinion of this office reported in Quarterly Report of the Attorney General, Vol. 69, page 49, is overruled.

Very truly yours,

JOHN PATTERSON
Attorney General

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